

30(b)(6) Luv N' Care (Edward Hakim) - Vol. I

May 20, 2009

Monroe, LA

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

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LUV N'CARE, LTD AND)
ADMAR INTERNATIONAL, INC.)
VERSUS) NO. 08-CIV 4457
WALGREEN CO., AND KMART CORP)
-----X

VOL. I

30(b)(6) DEPOSITION OF LUV N' CARE, LTD THOUGH
ITS DESIGNEE EDWARD HAKIM, commencing at 4:08 p.m. on
May 20, 2009, at the Atrium, Bonaparte Room, 2001
Louisville Ave, Monroe, Louisiana. Reported by Paige
Davenport, Certified Court Reporter Certificate Number
28004, State of Louisiana.

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1 APPEARANCES:

2 FOR PLAINTIFF ADMAR:

3 Law office of Mr. Joe D. Guerriero

4 3030 Aurora Avenue

5 Monroe, Louisiana 71201

6 Appearing herein by and through:

7 Mr. Joe D. Guerriero

8

9 FOR DEFENDANT WALGREEN CO.:

10 Christopher & Weisberg, P.A.

11 200 E. Las Olas Blvd, Suite 2040

12 Fort Lauderdale, FL 33301

13 Appearing herein by and through:

14 Mr. Jason R. Buratti

15

16 FOR DEFENDANT KMART CORP:

17 Wiley Rein

18 1776 K Street NW

19 Washington, DC 20006

20 Appearing herein by and through:

21 Mr. Robert J. Scheffel

22

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1 ALSO PRESENT:

2 Mr. Garrett Berten

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1 STIPULATIONS

2 This deposition is being taken for the
3 discovery/trial in accordance with Article 1421,
4 et seq., of the Louisiana Code of Civil
5 Procedure. All formalities in connection with
6 the taking of the deposition are waived with the
7 exception of the swearing of the witness and
8 reduction of questions and answers to
9 typewriting.

10 The witnesses and parties have reserved the
11 reading and signing of the deposition.
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1 **A. That's correct.**

2 Q. What is the product in exhibit A
3 called?

4 **A. Sports sipper.**

5 Q. What is the product in exhibit D
6 called?

7 **A. Flip it cup, and some people call it a**
8 **straw cup, but it's a flip it straw cup.**

9 Q. Mr. Hakim, I'm going to hand you
10 exhibits 35 and 39. First, is there any
11 difference in the physical product of exhibits -
12 what were the exhibit numbers?

13 **A. Yes.**

14 Q. There is a physical difference? What's
15 the physical difference in the products of
16 exhibits 35 and 39?

17 **A. Thirty-nine, exhibit 39, was our old**
18 **version, and exhibit 35 is a newer version with a**
19 **much stronger, clarified PP, and a more**
20 **clarified, different brand of silicone. Exhibit**
21 **35 will take much more impact than exhibit 39.**

22 Q. When did the physical product change?

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1 **A. I think the product changed sometime -**
2 **we made the change sometime - December/January.**
3 **January of '09 -**

4 Q. '09?

5 **A. December '08. Additionally, the screw**
6 **cap on exhibit 39 is opaque and the screw cap on**
7 **35 is transparent.**

8 Q. Translucent? Is that a more
9 appropriate term for it? It lets light through,
10 but it's not transparent? You can see through
11 it?

12 **A. Translucent, but you can also see**
13 **through it as well, when's it taken off, so I**
14 **would call it transparent.**

15 Q. Why did Luv 'N Care change from the
16 translucent, older design to the opaque, newer
17 design for the cap?

18 **A. To get a - to get what we call a**
19 **fluorescent look. A brighter - so you could get**
20 **the colors brighter in the screw caps. Hold it**
21 **up to the light. I think that will help you.**

22 Q. So, the newer cup has the translucent

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1 screw cap?

2 **A. That's correct.**

3 Q. And the older cup has the opaque cap?

4 **A. Opaque.**

5 Q. Now, are there any other changes to the
6 physical product, from exhibit 39 to exhibit 35?

7 **A. With regards to the cup itself, no.**

8 Q. Now, what are the differences between
9 the packaging from exhibit 39 to exhibit 35?

10 **A. There's been a slight packaging update,
11 or packaging change, with regards to the shrink
12 film.**

13 Q. With regards to the what?

14 **A. The shrink film, the printed shrink
15 film, which is shrunk around both cups.**

16 Q. What are the changes?

17 **A. Each one?**

18 Q. Yes.

19 **A. All right, the arrow -**

20 Q. Arrow?

21 **A. The arrow -**

22 Q. Okay.

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1 A. - on exhibit 39 is red, with a dark
2 blue outline. The arrow on exhibit 35 is a
3 graded blue, with a darker blue outline. The
4 word soft is in red on exhibit 39, with a dark
5 blue outline. The word soft is also larger in
6 type, and also a different style type than that
7 of the word soft on exhibit 35. Exhibit 35, the
8 word soft is a smaller type than that on exhibit
9 39. It's also in blue, which is not on 39
10 exhibit. It's also outlined with a white, double
11 stroke. The word spout on exhibit 39 is in blue.
12 It's in a darker blue than that on exhibit 35.
13 It's in a different style type. It also has a
14 light background, with a stroke. However, the
15 inside of the letters on the P and the O inside
16 the center of the word you have a white
17 background. The word spout, also on exhibit 39,
18 has an exclamation mark in blue, which is
19 outlined in white, which does not appear on the
20 word spout in exhibit 39. The word soft spout is
21 not surrounded by another color, nor is it
22 overlaid onto another color, as the word soft

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1 silicone spout is on exhibit 35, which has a
2 background of red, which is also in a sunburst,
3 and the sunburst is surrounded on the top and the
4 left and right side by an orange and yellow
5 outline. The wording above the sunburst on
6 exhibit 35 has wording that reads, I believe that
7 must be - it's a foreign language. I'm not sure
8 what foreign language it is. It could be -

9 Q. There's four words.

10 A. - one of a hundred, one of about 50
11 different foreign countries that we sell in.
12 It's in one of those languages. I don't recognize
13 it. Moving down to the center of the cup, the
14 verbiage no spill cup on the exhibit 39 is all in
15 white. It's in one straight line, and has a
16 different font that the verbiage no spill cup on
17 exhibit 35. The no spill cup on exhibit 35 is in
18 blue type, with a white stroke. The O on exhibit
19 35 is that of a trademark symbol that's got,
20 looks like a drop of water with a line through
21 it, and a circle around it, with a white
22 background. The entire wording, no spill cup,

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1 has a yellow background with a lot of yellow
2 dots. That's on exhibit 35. On exhibit 39, the
3 no spill cup is in white with a blue background.
4 To the right of no spill cup, we have a half of a
5 rectangle, which is in a light blue, and a light
6 green, and a darker green outline that reads six
7 months plus, and a white with a green stroke
8 around the wording six months plus. That is not
9 contained on exhibit 39. On exhibit 35, in the
10 yellow bank, which is the background of the
11 verbiage, no spill cup, there's a verbiage that
12 reads 10oz. 295mL., and then it shows a recycle
13 symbol, and a wash symbol. That is a different
14 style and font than that on exhibit 39, which is
15 in white that says 10oz.295mL. Looking back at
16 the verbiage of Nuby on exhibit 35, that is to
17 the center of the cup. It's marked in red, with
18 a white background, and a red outline, which is
19 around the verbiage Nuby. On exhibit 39, the
20 Nuby is the same, but it's smaller, and it is to
21 the left hand side of the cup. On exhibit 35,
22 there's a symbol on the right side of the package

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1 which reads easy to use, with a check in the
2 middle, natural drinking action. That has a
3 white background, with red words, and a red
4 outline. That is not contained on exhibit 39.
5 On exhibit 35, directly up under the word Nuby,
6 there's a symbol that symbolizes Veri-Flo.
7 That's a symbol that we made up. To the right
8 side of that symbol reads, Veri-Flo Valve/and
9 then it's in that same foreign language. On the
10 exhibit 39, that symbol is not on that cup. On
11 exhibit 35, there's a symbol to the left of the
12 words no spill cup, which says BPA free. The BPA
13 free symbol is in green, with white lettering,
14 and a stroke of darker green around the verbiage
15 BPA free. There's no BPA free symbol on exhibit
16 39. On exhibit 35, under the name Nuby, it just
17 has the trademark. However, on exhibit 39, under
18 the name Nuby, it has by Luv 'N Care, and a dark
19 purplish blue. On exhibit 39, -

20 (PHONE RINGING)

21 MR. GUERRIERO: Sorry.

22 A. - right in front of the word, no spill

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1 cup, which is in the dark blue band, you have a
2 symbol that says - well, it's a big dot with a
3 line through it. It's a white background, with a
4 dark blue outline. To the left of that is
5 verbiage that says, no valve. To the right side
6 of that is says, no mess. Neither of those, in
7 that format, are on exhibit 35. Directly up
8 under that, you have verbiage that says, no more
9 leaky valves!, with a big red dot to the left of
10 that. All that verbiage, exclamation mark, and
11 dot is in red with a dark blue outline. If you
12 go to the back of the cup, they both have UPC's
13 with a white background, and a dark blue outline.
14 Up under exhibit 35, the UPC code, it has the
15 name Nuby in red with a white background. On
16 exhibit 39, up under the UPC code, the labeling
17 reads Luv 'N Care, Limited, and a white
18 lettering, with a dark blue background, and then
19 they both have an address up under each one of
20 them. On exhibit 39, it reads P.O. Box 6050,
21 Monroe, Louisiana, 71211, U.S.A., and then it
22 gives a and a 1-800 number,

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1 **1-800-Luv-N-Care. On exhibit 35, that verbiage**
2 **reads Luv 'N Care, Limited, 3030 Aurora Avenue,**
3 **Monroe, Louisiana, 71201, U.S.A.,**
4 **<http://www.nuby.com>, 1-800-Luv-N-Care.**

5 Q. And also the color the stripe?

6 A. **I went over all that.**

7 Q. Did you get the color of the stripe?

8 A. **The color of these stripes?**

9 Q. Yeah, the stripe across the middle.

10 A. **I did that twice.**

11 Q. That's why I said - that was a lot of
12 changes. The packaging is not - the packaging is
13 not shown in the exhibit B to the complaint, is
14 it?

15 A. **I don't think so, but we'll look and**
16 **see. No, there's no packaging shown.**

17 Q. Is packaging part of the trade dress
18 that's asserted against Walgreens in this case?

19 A. **Yes.**

20 Q. What packaging?

21 A. **It would be the packaging in exhibit**
22 **39.**

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1 Q. But not the packaging in exhibit 35?

2 A. It would be both.

3 Q. Would you categorize the number of
4 changes that you just identified in the packaging
5 between exhibits 39 and 35 as a lot?

6 A. A lot of changes with regards to the
7 location, and the different words in the
8 verbiage, but we made this change, as I said, in
9 December, December 2008, January 2009, and this
10 product won't land here in the U.S.A. for
11 probably another 60 days.

12 Q. So, there's no public use yet in the
13 United States of the packaging in exhibit 35?

14 A. No.

15 Q. Are you aware of whether or not
16 Walgreens has ever been provided notice that it's
17 - that there's packaging trade dress asserted
18 against it?

19 A. I can tell you that Walgreens was sent
20 a letter by our attorneys, and I think that
21 letter speaks for itself, whatever it addresses
22 is self explanatory.

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1 Q. Is that the July, 2006, letter?
2 Exhibit 29?

3 A. This is one letter. There may be more.
4 I'm not sure about that. We would just have to
5 talk to the attorneys and find out.

6 Q. I'm just going to ask Joe D., since
7 he's here.

8 MR. BURATTI: That's the only letter
9 that we're aware of. Is that -

10 MR. GUERRIERO: Let's go off the
11 record for a minute.

12 MR. BURATTI: All right.

13 (OFF RECORD)

14 Q. All right, to Luv 'N Care's knowledge,
15 is this, exhibit 29, the only letter that has
16 been dispatched to Walgreens that would have
17 asserted trade dress?

18 A. I believe so, but I'm not sure.

19 Q. And that trade dress is referred to in
20 the letter? Look at the bottom of the second
21 paragraph.

22 A. What specifically are you asking about

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1 **this letter? The second page or the first page?**

2 Q. There's a reference to trade dress in
3 the second paragraph. You see that?

4 A. **Yes, second paragraph, page one, of the**
5 **July 18, 2006 letter.**

6 Q. And is there any packaging referred to
7 in that letter?

8 A. **Yes.**

9 Q. Where?

10 A. **Under trade dress.**

11 Q. How could Walgreens have known that?

12 A. **How could Walgreens have known what?**

13 Q. Have known that the trade dress meant
14 packaging, as opposed to product design?

15 A. **Well, it's talking about the product.**
16 **It doesn't say the cup or the package.**

17 Q. And do you see in the second to last
18 paragraph, Mr. Cohen, that's Luv 'N Care's
19 lawyer, right?

20 A. **That's correct.**

21 Q. Mr. Cohen says, in the second to last
22 paragraph in that letter, -

1 **A. On the first page?**

2 Q. I'm sorry, the second to last paragraph
3 on the second page. Do you see there, it says, I
4 am not accusing you of infringement at the
5 present time?

6 **A. Yeah, let's put the whole paragraph in.**
7 **Let's not take one little excerpt out of the**
8 **sentence. It is my understanding that you have**
9 **not sold, offered for sale, or imported any**
10 **unauthorized products to date. Accordingly, I am**
11 **not accusing you of infringement at this time.**

12 Q. Okay, but there's no accusation of
13 infringement associated with the July, 2006,
14 letter. Is that right?

15 **A. That's incorrect. What Mr. Cohen is**
16 **trying to say, and I think it's self-explanatory**
17 **if anybody can read it, that since you - we don't**
18 **believe you imported it or sold it, there's no**
19 **infringement. Obviously, once you import it and**
20 **sell it, there's infringement.**

21 Q. Had Mr. Cohen seen, prior to sending
22 this letter for Luv 'N Care, packaging that would

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1 have been associated with any other Walgreen's
2 product, that would compete with Luv 'N Care
3 products?

4 **A. Has he seen our packaging?**

5 Q. Has he seen any other packaging that
6 Walgreens was considering using?

7 **A. I don't know, you would have to ask Mr.**
8 **Cohen. There would have been more than one way**
9 **to have gotten a sample of it, and purchased it.**

10 Q. How?

11 **A. Well, they could have seen it in the**
12 **Walgreen's offices. They could have been given a**
13 **sample. They could have taken a sample out of**
14 **the sample room. From my understanding, anybody**
15 **could go in that sample room, unescorted.**

16 Q. Where did you get that understanding?

17 **A. From Jack Hakim and Nathan.**

18 Q. Their understanding was that anyone
19 could walk into -

20 **A. Sample room.**

21 Q. And that understanding - when did you
22 receive that understanding from them?

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1 **A. A week or two ago.**

2 Q. Was it after Mr. Kruckman's deposition?

3 **A. I believe so.**

4 MR. BURATTI: Counsel -

5 **A. The sample room is basically open to**
6 **anyone. That's what I was told.**

7 MR. BURATTI: And Mr. Guerriero, this
8 question is for you. I just want to know who the
9 representatives will be that will be under the
10 protective order, because it sounds as though
11 there may have been discussions about the subject
12 matter of that deposition?

13 MR. GUERRIERO: Not with me.

14 MR. BURATTI: Do you know who the
15 representatives are? I assume it's going to be
16 Ed, and Jack, and Joe.

17 MR. GUERRIERO: Yes.

18 MR. BURATTI: But not Mr. Samosh?

19 MR. GUERRIERO: No. Are you talking
20 about as it relates to the protective order?

21 MR. BURATTI: Right, when it's
22 entered.

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1 MR. GUERRIERO: I'm sure we can reach
2 an agreement who all is going to be in it. We
3 can certainly have discussions, and it shouldn't
4 be a problem as to designate whose going to be in
5 it.

6 Q. Did you discuss the Kruckman deposition
7 with Mr. Samosh at all?

8 **A. No. Who is Mr. Kruckman?**

9 Q. Mr. Kruckman was Walgreen's rule 30(b)6
10 designee.

11 **A. No, I don't know him. Never seen him,**
12 **never talked to him.**

13 Q. I'm going to hand you what's previously
14 been marked as exhibit 10, and just get you to
15 confirm for me that the packaging in exhibit 10
16 is that that's on exhibit 39.

17 **A. No, it's not the same packaging.**

18 Q. So, the packaging from exhibit 10 to
19 exhibit 39 is -

20 **A. Different as well. It is closer to**
21 **that of exhibit 35.**

22 Q. Which is? Which is closer?

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1 **A. Thirty-five.**

2 Q. But which is closer, exhibit 10 or
3 exhibit 39?

4 **A. What you gave me -**

5 Q. Exhibit 10 looks more like -

6 **A. Yeah, it looks more like 35, not 39.**

7 Q. I'm going to hand you what's previously
8 been marked as exhibit four. Do you recognize
9 the product depicted in exhibit four?

10 **A. That's correct.**

11 Q. And is that newer packaging or older
12 packaging?

13 **A. This is the only packaging that we ever**
14 **made for Walgreens.**

15 Q. Is the packaging in exhibit four closer
16 to exhibit 35 or exhibit 39?

17 **A. It's closer to exhibit - neither.**
18 **Neither, really. This is two pack. These are**
19 **single packs.**

20 Q. Exhibit four is the two pack gripper
21 cup?

22 **A. It's the two pack gripper cup.**

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1 Q. And the -

2 **A. Exhibit four.**

3 Q. The one sold by Walgreens previously?

4 **A. That's correct.**

5 Q. Is that packaging trade dress asserted
6 against Walgreens?

7 **A. Yes.**

8 Q. When was that assertion inserted into
9 this case?

10 **A. The packaging? It's always been. It's**
11 **a trade dress. It's spelled out in Morris Cohen's**
12 **letter.**

13 Q. Can you show me where in the complaint
14 a trade dress that includes packaging as to the
15 gripper cup, as asserted against -

16 **A. I can read the complaint. I'm not an**
17 **attorney, but we can go through - if you have the**
18 **time, we can go through it.**

19 Q. I think it's actually broken down into
20 sections that refer to exhibits, if that helps,
21 but you take your time.

22 MR. GUERRIERO: For purposes of

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1 convenience, since I wasn't at the last
2 deposition, is that exhibit four to what?

3 MR. BURATTI: That's defendant's
4 exhibit four.

5 MR. GUERRIERO: Okay.

6 A. Well, I mean, I'm right here on the
7 very first page that I turned to, on 13, where it
8 says facts, significant times, funds, and effort
9 for also expanding, designing, and developing
10 essentially appealing and attractive product
11 designs and packaging for plaintiff's goods.

12 Q. I'm trying to target just exhibit B. I
13 mean, there's no - we already established that
14 there's no packaging in exhibit B to the
15 complaint, which I'll show you has been - well,
16 you have the black and white there in front of
17 you. Right? There's no packaging in exhibit B to
18 the complaint.

19 A. Okay, we'll say there's no packaging in
20 the exhibit.

21 Q. And there's no packaging in exhibit C?

22 A. That's correct.

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1 Q. And there's no packaging in exhibit E?

2 **A. No, you're correct.**

3 Q. If you turn back to exhibit A to the
4 complaint, though, there is packaging, right?

5 **A. Yes.**

6 Q. So, it stands to reason that you could
7 have included packaging in the exhibits to the
8 complaint for the other exhibits?

9 **A. I guess the attorney could have.**
10 **There's packaging in C.**

11 Q. There -

12 **A. See? There is packaging.**

13 Q. Okay, and where is the packaging in
14 exhibit C?

15 **A. It's inside the cup. That's the only**
16 **packaging that's ever been, and it is just like**
17 **their package. Well, their packaging is**
18 **obviously just like our packaging. Identical.**
19 **Same color leaflet, verbiage, folded, put inside**
20 **the cup.**

21 Q. Prior to May 1, 2009, how would
22 Walgreens have known about the packaging on

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1 exhibit 35?

2 **A. Prior to May1, 2009?**

3 Q. Yeah.

4 **A. They wouldn't have.**

5 Q. And would any U.S. consumer have known
6 about the packaging on exhibit 35?

7 **A. It depends on whether we've used that**
8 **package before.**

9 Q. You don't know?

10 **A. We've had about a dozen different style**
11 **packagings for this cup, depending on the**
12 **country, and who they go to.**

13 Q. But what we're talking about, which
14 we've noted repeatedly, products in the United
15 States, for United State trade dress protection,
16 right?

17 **A. Well, I would say that we try to keep**
18 **our packaging looking somewhat similar, so I**
19 **would say that this package on exhibit 35, since**
20 **it's a single pack, and obviously not a two pack,**
21 **and doesn't have all the verbiage on the other**
22 **exhibit four that you gave me, but it is somewhat**

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1 similar to that of exhibit four, with regards to
2 the big yellow stripe with the dots, behind the
3 word no spill cup. And of course, it doesn't
4 have the "Wow! \$3.00" because that's what we used
5 for Walgreens. All we did was take the packaging
6 on exhibit four and simply make it for a single
7 pack, and we could figure the verbiage so it
8 would fit a single pack, and not a two pack.

9 Q. Now, the packaging on exhibit four was
10 just for Walgreens?

11 A. No, for other people as well.

12 Q. How many times does the word Nuby
13 appear on the packaging for exhibit 35?

14 A. Once on the front, and once on the
15 back, that may be a lot of small verbiage up
16 above there. You can read it better than me.

17 Q. Once in the web site domain, right?

18 A. Right.

19 Q. -

20 A. Yes, but other than that, its got Nuby
21 in red on the back.

22 Q. Right. No spill, Veri-Flo, and Nuby

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1 are registered trademark in the small print.

2 That's four on the packaging, right?

3 **A. Right.**

4 Q. And then it also appears on the product
5 itself?

6 **A. Yes, on the very face of the product.**

7 Q. How many times?

8 **A. To the fact of the product, which is**
9 **engraved, that's on the - it's embedded and**
10 **engraved in the silicone spout. Not good lighting**
11 **in here. It may be on the bottom. Let's see.**
12 **It's on the bottom.**

13 Q. So, seven times the word Nuby appears
14 on the exhibit 39 product?

15 **A. That's correct.**

16 Q. I'm sorry, I said 39, I meant 35.

17 **A. Thirty-five.**

18 Q. And does it also appear that many times
19 on the exhibit 39 product?

20 **A. On 39? It appears on the bottom of the**
21 **cup. That's one. Engraved on the face of the**
22 **cup, is two, and then the spout, that's three.**

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1 **The face of the cup, four, five. Five times on**
2 **the product, and this is not counting the**
3 **leaflets on the inside.**

4 Q. Does the packaging on exhibit 39 what
5 Nuby used for its one pack gripper cup prior to
6 2009?

7 A. **At least this one, maybe more.**

8 Q. Does Walgreens sell any one pack
9 accused products that are the soft spouted type?

10 A. **I don't know if they took promotions on**
11 **the onset of this program.**

12 Q. I'm talking about accused products, not
13 Luv 'N Care.

14 A. **You're talking about ours?**

15 Q. I'm talking about accused.

16 A. **Oh, theirs?**

17 Q. The Walgreen product.

18 A. **I don't know.**

19 Q. Assume for a moment, if I represented
20 to you that Walgreens doesn't sell, and never has
21 sold a one pack - a one piece soft spout cup,
22 would you be asserting -

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1 **A. I would take your word for it.**

2 Q. Well, would you be asserting then, one
3 pack gripper cup packaging against Walgreens, or
4 just the two pack packaging?

5 **A. I would only assert against Walgreens**
6 **what I, personally, feel looks like our package.**
7 **If we have a two pack package, and they had a one**
8 **pack package, and the packages still look alike?**
9 **Yes, and vice versa. If we sold them a one pack,**
10 **and they made their two pack look like the two**
11 **pack of our one pack, I would still say yes, they**
12 **would infringe.**

13 Q. To Luv 'N Care's knowledge, is
14 Walgreens doing that?

15 **A. Doing what?**

16 Q. Making a two pack packaging that looks
17 like one pack Luv 'N Care packaging?

18 **A. I think their packaging looks just like**
19 **our packaging.**

20 Q. But which packaging? The exhibit four
21 packaging? The exhibit 35 packaging, or the
22 exhibit 39 packaging?

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